

ATTORNEY GENERAL
STEPHEN E. MERRILL

DEPUTY ATTORNEY GENERAL
BRUCE E. MOHL

ASSOCIATE ATTORNEYS GENERAL
BRIAN T. TUCKER
JEFFREY R. HOWARD

THE STATE OF NEW HAMPSHIRE



SENIOR ASSISTANT ATTORNEYS GENERAL
ROBERT P. CHENEY, Jr.
GEORGE DANA BISBEE
PETER G. BEESON

ASSISTANT ATTORNEYS GENERAL
LESLIE J. LUDTKE
JEREMY F. KORZENIK

ATTORNEYS
EMILY S. BERNHEIM
GEOFFREY M. HUNTINGTON

INVESTIGATOR
CHRISTOPHER T. DOMIAN

PARALEGAL
TARA BICKFORD BAILEY

THE ATTORNEY GENERAL
ENVIRONMENTAL PROTECTION BUREAU
STATE HOUSE ANNEX
25 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

(603) 271-3679

February 13, 1987

Alden H. Howard, Commissioner
Department of Environmental Services
Hazen Drive
Concord, NH 03301

Dear Commissioner Howard:

You have asked this office whether the vacancy in the newly-created position of Director of the Waste Management Division, Department of Environmental Services ("Waste Management Division"), may be filled temporarily by the appointment of John Minichiello as Acting Director. Prior to January 1, 1987, the effective date of the reorganization which established the Department of Environmental Services ("DES") under RSA Ch. 21:0, Mr. Minichiello supervised the State's waste management programs as Assistant Director of the Division of Public Health Services. He has continued to perform these duties during the implementation of reorganization and the transfer of functions to the Division of Waste Management.

However, the legislature has imposed new educational requirements for any Director of the Waste Management Division under RSA 21-0:2, III(c). Your office has not submitted to the Governor and Executive Council the name of any nominee who possesses these qualifications, and you have therefore inquired whether Mr. Minichiello may be appointed Acting Director so that he can continue his former functions, until he or another candidate qualifies for appointment as Director.

Your inquiry raises these issues:

1. How should we construe RSA 21-G:18, which directs employees of reorganized agencies to continue performing any former responsibilities deemed necessary by the Commissioner of the new agency, in light of RSA 21-0:2, III(c), which imposes new qualifications for the Director of the State's waste management program?



2. Under RSA 4:5, which provides for the appointment of "acting" department heads in specified circumstances, is it necessary for there to have been a permanent director before an acting director may be appointed?

3. If an acting director may be appointed for the Division of Waste Management, what provisions regarding salary are applicable?

In regard to the first issue, the central question is whether the legislature's establishment of new qualifications for permanent Directorship of the Waste Management Division under RSA 21-0:2, III(c) is completely irreconcilable with RSA 21-G:18, a previously enacted statute which governs the transfer of former employees to new agencies during reorganization. If so, RSA Ch. 21-0 would control, as a later-enacted provision impliedly repeals any inconsistent earlier enactment. See Gazzola v. Clements, 120 N.H. 25, 28 (1980). However, such a later statute prevails only if the conflict between the two provisions is irreconcilable. If there is any reasonable interpretation that reconciles the two statutes, such an interpretation will control. Id.; Swiezynski v. Civiello, 126 N.H. 142, 148 (1985); State v. Woodman, 114 N.H. 497, 500 (1974); State v. Wilton Railroad Co., 89 N.H. 59, 61-62 (1937).

RSA 21-G:18 provides that

"[a]ll employees heretofore engaged in the performance of duties in each agency abolished whose powers, duties, functions and responsibilities are transferred in accordance with this chapter and any laws enacted by the general court ... are hereby transferred to the department to which such powers, duties, functions and responsibilities are transferred to the extent the commissioner deems necessary to carry out the functions of the abolished agency and shall, insofar as practicable and necessary, continue to perform the duties heretofore performed, subject to applicable personnel statutes."

RSA 21-G:18. Therefore, the statute creates a presumption that employees will continue their former duties during and after an executive branch reorganization, subject to the explicit authority of the commissioner to determine when such continuity is necessary.

Under RSA 21-0:8, the former functions of the Division of Public Health Services, Office of Waste Management, and of the Solid Waste Board were transferred to the Division of Waste Management. Therefore, the critical question is whether the new language governing the Director's qualifications irreconcilably prohibits a former director from continuing his duties immediately upon the effective date of RSA 21-0.

The statute provides that "[t]he commissioner shall nominate for appointment by the governor and council a director of waste management. Each nominee shall hold a master's degree ... and have five years' experience in a high level supervisory or administrative position in a public or private agency engaged in waste management

... or a related discipline." RSA 21-0:2,III(c). The use of the word "shall" indicates that it is mandatory to nominate a qualified director. See Appeal of Concord Natural Gas Corp., 121 N.H. 685, 691 (1981). However, the statute imposes no deadline for the appointment of such a director. Therefore, RSA 21-0:2,III(c) is inconsistent with RSA 21-G:18 only if RSA 21-0:2,III(c)'s silence about the deadline for appointing a director is construed as prohibiting anyone, other than a duly appointed director, from carrying out a director's functions immediately upon the effective date of RSA Ch. 21-0.

A more reasonable interpretation of the above two statutes exists. RSA 21-G:18 permits the Commissioner to determine when former employees such as Mr. Minichiello should continue to carry out their former responsibilities. In turn, RSA 21-0:2,III(c) can be read to require the Commissioner to nominate potential appointees with the requisite qualifications, but to allow a reasonable time period in which to perform this duty. Such an interpretation reasonably reconciles both statutes, and therefore governs under the principles outlined above.

In addition, to interpret RSA 21-0:2,III(c) as repealing RSA 20-G:18 would partially nullify the purpose of RSA Ch. 21-0 itself. Statutory provisions must be viewed in light of the legislation as a whole. See Costoras v. Noel, 100 N.H. 81, 83 (1956). If RSA 21-0:2,III(c) requires that the Waste Management Division remain leaderless prior to the appointment of a permanent Director in these circumstances, the statute's underlying purpose of achieving agency consolidation and increased effectiveness would be defeated. See RSA 21-0:1, 21-0:3. Statutory provisions should not be read to produce illogical results or to conflict with the legislature's overall purpose. See State v. Kay, 115 N.H. 696, 698 (1975), State v. Woodman, supra, at 500.

This result is consistent with other statutes governing reorganization. The shift of authority from an abolished agency to a new entity is intended to involve an "orderly transfer of the agencies, and [their] duties, responsibilities and functions." Laws 1983, 312:4. One of the primary means of achieving such an orderly transfer is the retention of administrators who can continue to perform "the ongoing responsibilities of managing an agency." See Letter to Honorable William M. Gardner, Secretary of State, from Bruce E. Mohl, Deputy Attorney General (Dec. 10, 1985). Therefore, RSA 21-G:18 permits the Commissioner to retain Mr. Minichiello in his former capacity as supervisor of state waste management programs, pending the appointment of a permanent director under RSA 21-0:2,III(c).

Since there is no prohibition in RSA Ch. 21-0 against Mr. Minichiello carrying out his former functions, I will turn to your second question regarding his designation as "Acting Director." Specifically, you asked whether a nomination for Acting Director may be made despite the fact that no permanent director has ever served in the position.

RSA 4:5 authorizes the Governor and Council to appoint a temporary head for any State department when the department head is temporarily unable, "by reason of illness or otherwise," to fill the position. Where the law makes no other provision for an interim appointment, the statute provides that "the governor, with the advice and consent of the council, may appoint a person to act in his stead, and the person thus appointed shall have the powers and perform the duties of such head of department for such time, for such compensation, and subject to such qualifications as the governor and council ... deem appropriate." RSA 4:5.

Read narrowly, RSA 4:5 would apply only to situations where an existing director is unable to serve. However, the underlying purpose of the statute is to provide a mechanism for continuing leadership whenever a temporary vacancy exists, and there is no other means for filling it on an interim basis. This office previously has construed RSA 4:5 as permitting the appointment of an Acting Director of Motor Vehicles when the directorship was entirely unoccupied due to the former officer's resignation. See Letter to His Excellency Governor John Sununu from Attorney General Stephen E. Merrill (Dec. 24, 1985). The critical elements for applying RSA 4:5 in those circumstances consisted of the existing vacancy, the need for a person to perform the continuing duties of the Director, and the purpose of the statute itself. Id.; See also Piecuch v. City of Manchester, 114 N.H. 8, 11 (1974). Therefore, under the similar circumstances presented here, RSA 4:5 permits you to nominate an Acting Director for the Waste Management Division for approval by the Governor and Executive Council.

It should be noted that while RSA 21-0:2,III(c) does not set a specific time limit for the appointment of a Director with the specified qualifications, it does indicate that such appointment is mandatory. RSA 4:5 may not be used to defeat the legislative purpose in establishing such qualifications. The Commissioner's Office has authority to determine when former employees should continue to carry out their former duties under RSA 21-G:18, and RSA 4:5 permits the appointment of an Acting Director, but reasonable limits should be imposed on such an interim appointment. Therefore, it would be appropriate for your office to request, and for the Governor and Executive Council to impose, specific conditions or time limits on the appointment of any Acting Division Director in order to effectuate the purposes of RSA 21-0:2,III(c). See RSA 5:4.

Your final question relates to the applicable requirements regarding the salary of any Acting Director for the Waste Management Division. Under RSA 94:1-c, when a state employee "is appointed or officially designated as the acting director ... of any state agency ... to fill a vacancy in the ... position, he shall be compensated at the minimum step of the salary range at which the director ... is compensated." Alternatively, if the salary previously received by the appointee was greater than the minimum step of the new salary range, "he shall be compensated at the next step within the salary range ... which is above the salary he was receiving prior to his appointment." Id. While RSA 94-1-c is suspended in the case of

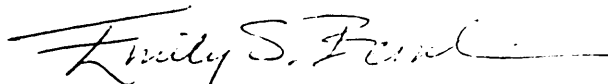
Alden H. Howard, Commissioner
Page 5
February 13, 1987

temporary employee assignments during the preparation of an implementation plan for reorganization, the statute is applicable in the case of an appointment after the effective date of reorganization. See Laws 1983, 372:4,II.

The salary range for the Director of the Waste Management Division is set forth in the "Implementation Plan to Establish the New Hampshire Department of Environmental Services" ("Implementation Plan"), established pursuant to Laws 1983, 372:4 and Laws 1986, 202:26. The Implementation Plan requires payment of a salary between \$34,588 and \$44,013, with salary increments as established by RSA 94:3. Implementation Plan, Section 5. For your convenience, I have attached a copy of RSA 94:3. Pursuant to RSA 94:1-c and RSA 4:5, your office should propose, and the Governor and Executive Council should adopt, a salary based on the above requirements established in the Implementation Plan should an Acting Director be appointed. See Letter to Stephen M. Kennedy, Commissioner, Administrative Services from Douglas N. Jones, Assistant Attorney General (Feb. 25, 1986) (construing RSA 94:1-c).

I trust this responds to your inquiry. Please contact me if you have any questions.

Sincerely,



Emily S. Bernheim
Attorney
Environmental Protection Bureau

ESB/mmp

#0-87-010